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No. 92-9059

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1992

JONATHAN DALE SIMMONS,

Petitioner,

vs.

SOUTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

I. Did the trial court's refusal to inform the jury that Petitioner could never be paroled if sentenced to life imprisonment violate his due process right to rebut the prosecution's case for death, where the state argued that Petitioner would pose a grave risk of future violence unless he was executed, and where the jury specifically asked about the possibility of parole? (Question II on Petition).

II. Does the Eighth Amendment entitle a capital defendant to have the sentencing jury informed, as a reason not to impose the death penalty, that under state law the jury's sentencing alternative of "life imprisonment" means life without the possibility of parole? (Question I on Petition).

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BRIEF OF RESPONDENT

The Respondent, State of South Carolina, hereby submits this Brief of Respondent on Writ of Certiorari to the Supreme Court of South Carolina.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported as State v. Simmons, 427 S.E.2d 175 (S.C. 1993), and is reprinted in the Joint Appendix (hereafter "J.A.") at 164-174. The Order of the South Carolina Supreme Court denying rehearing is unreported, and is reprinted at J.A. 175.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on February 1, 1993. A timely Petition for Rehearing was denied on March 10, 1993. The Petition for Writ of Certiorari was filed on June 8, 1993, and granted on October 4, 1993. This Court's jurisdiction is alleged to be

invoked pursuant to 28 U.S.C. Section 1257(a). Respondent will assert that there is no federal question presented and the Court is without jurisdiction to review the claim. U.S.S.Ct.R. 10.1(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the United States Constitution, which forbids the infliction of "cruel and unusual punishments."

2. It also allegedly involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> [N]or shall any state deprive any person of life ... without due process of law ....

3. It also involves S.C. CODE Sections 16-3-10, et seq. (1991 Cum. Supp.), which code sections are reprinted in the Appendix to the Petition for Writ of Certiorari at A-8 through A-14.

4. It also involves S.C. CODE Section 24-21-640 (1991 Cum. Supp.), which provides in pertinent part:

> The [South Carolina] Board [of Probation, Parole and Pardon] must not grant parole, nor is parole authorized, to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60. Provided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses must be treated for purposes of this section as one offense.

5. It also involves S.C. CODE Ann. Section 16-1-60 (1991 Supp.), which provides in pertinent part:

> For purposes of definition under South Carolina law a violent crime includes the offenses of murder, criminal sexual conduct in the first and second degree ... [and] burglary in the first degree ....

STATEMENT OF THE CASE

a. Procedural History.

This case involves the tragic and brutal murder of Ms. Josie Lamb. On July

17, 1990, Ms. Lamb, a seventy-nine year old female who lived alone, was found dead on the bathroom floor of her home in the Olympia residential area of Columbia, South Carolina. Her skull had been crushed by Jonathan Dale Simmons, the Petitioner, who had used a toilet tank lid to repeatedly beat her on the head. She had suffered multiple blows to the head resulting in three fractures and nine lacerations. Her forearms were also bruised. The bathroom was also splattered with blood.

The evidence revealed that Simmons had entered her home through the side door on the evening of July 16, 1990, with the intent to commit sexual assault upon Ms. Lamb. He had apparently been to her home the previous week but, when he approached and touched the door handle, Ms. Lamb had screamed and he fled. On the night of the murder, he entered the home and then heard

her scream. After looking around to be sure that no one else was present, Simmons went into the bathroom and struck Ms. Lamb repeatedly on her head with the commode lid with such suddenness and violent force that death was essentially instantaneous and her right hand still held the toilet paper she was using.

At some point, Simmons had unplugged Ms. Lamb's telephone. Also, he rummaged through her bedroom drawers and then stole a nightgown. Simmons' fingerprint was found on the commode lid and his bloody footprint was found on the floor. He was arrested the next day and confessed to killing Ms. Lamb.

The Petitioner, Jonathan Dale Simmons, was indicted by the Grand Jury of the Court of General Sessions for Richland County for murder, burglary in the first degree, and petit larceny on October 18, 1990. On January 24, 1991, the Solicitor

of the Fifth Judicial Circuit, the Honorable Richard A. Harpootlian, served Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation pursuant to S.C. CODE ANN. 16-3-26 (1986 Supp.).

The Petitioner proceeded to trial on June 24, 1991, before the Honorable Ralph King Anderson, Jr., Presiding Judge, and a jury. He was represented by Thomas J. Quinn, Jennifer Kneece Shealy, and Thomas W. Bunch, II, through court appointment. The State was represented by Solicitor Richard A. Harpootlian, Deputy Solicitor Warren B. "Barney" Giese, and Assistant Solicitor Jonathan S. Gasser. On June 27, 1991, the jury convicted the Petitioner of murder, burglary in the first degree, and petit larceny.

In the guilt phase of the trial, defense counsel conceded that Simmons had in fact murdered Ms. Lamb and had taken

the nightgown. He contended, however, that burglary in the first degree had not been proven concerning his intent to commit a crime in Ms. Lamb's house. In response, the prosecution introduced evidence of Simmons' confessions to other crimes of beatings and sexual assaults involving three elderly female victims: Faris Mims, Marie Furtick, and Estelle Simmons. As the Supreme Court of South Carolina stated concerning the admission of this evidence:

> The evidence of appellant's violence against elderly women, each of whom was alone in her home at the time of the attack, makes more probable appellant's criminal intent when he entered Ms. Lamb's house since he already knew her to be an elderly woman. Although there was no sexual assault in Ms. Lamb's case, all of the previous sexual assaults were accompanied by terrific physical violence far beyond that need to accomplish the sexual assault itself. Moreover, theft was not the overwhelming motivation in these prior cases. It is logical to conclude from the evidence that appellant was

> chiefly motivated in each case by an intent to violently injure an elderly woman.

(J.A. 168).

On June 28, 1991, the sentencing hearing began. During the hearing, Mr. Simmons was also represented by current counsel David I. Bruck, Esquire. After the presentation of evidence in aggravation and evidence in mitigation, the jury, on June 30, 1991, returned a unanimous verdict finding the existence of the statutory aggravating circumstance of murder was committed while in the commission of burglary in the first degree and a sentence of death. The trial judge affirmed the jury recommendation of death for murder. Judge Anderson sentenced the Petitioner to death for murder, life imprisonment for burglary in the first degree, and thirty (30) days consecutive for petit larceny.

Defense counsel timely served Notice of Appeal on July 1, 1991, and this appeal followed. On August 18, 1992, the Petitioner filed his Final Brief of Appellant raising the following pertinent issue:

> II. Where the state alleges that the defendant will pose an unreasonable risk of future violent acts unless executed, and where state law precludes all possibility of his release on parole if he is sentenced to life imprisonment, is the defendant constitutionally entitled to have the jury apprised of his ineligibility for parole?

The Petitioner was represented by Mr. Bruck and M. Anne Pearce of the South Carolina Office of Appellate Defense. The Respondent was represented by current counsel, Donald J. Zelenka of the Attorney General's Office. Oral argument was heard on October 13, 1992. On February 1, 1993, the Supreme Court of South Carolina entered its opinion affirming the judgment of conviction and sentence of death.

State v. Simmons, 427 S.E.2d 175 (S.C. 1993). A timely Petition for Rehearing was denied on March 10, 1993.

b. Pertinent facts of the case.

1. How the issue of parole ineligibility was presented.

Prior to the voir dire, the prosecution requested the trial judge to exclude any mention of "parole" throughout the trial. (J.A. 2). The prosecutor relied upon the state court decision in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315, 321 (1991), in which Justice Chandler in his majority concurring opinion stated that prior decisions of the state court were overruled "to the extent it permits the introduction of parole into the capital sentencing decision." Defense counsel disagreed on that interpretation and stated that they desired to be able to inquire of all jurors at the outset of voir dire on what life imprisonment meant

to them and whether it meant "an absolute life" or "some future parole eligibility" or "a natural life, no parole no max-out." (J.A. 5). The state trial judge, considering the Torrence decision, concluded that it "holds that a capital defendant is not entitled to probe potential jurors' misconceptions about the parole eligibility of persons sentenced to life imprisonment by advising them on voir dire what a life sentence meant to them." (J.A. 6).[1] The trial court then held that

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[1]The trial court further relied upon State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988), cert. den. 489 U.S. 1091 (1989), in which the South Carolina Supreme Court rejected an identical argument that a capital defendant's claim that he was constitutionally entitled to apprise the jury of restrictions on his eligibility for parole. Contrary to the Petitioner's erroneous illusion that the prosecutor "recognized the critical significance of petitioner's parole ineligibility in the determination of the sentence," Brief of Petitioner at 3, it is clear that the prosecutor and trial judge were seeking to have a trial free from error and in accord with the state law limitations established in Torrence, supra. Matthews, supra, 379 S.E.2d at

Torrence would be applied in this case at the appropriate time of jury instructions and that it "would not allow voir dire examination in regard to parole eligibility." (J.A. 7). The record of the voir dire reveals both parties complied with the trial judge's mandate and the specter of parole or early release was not injected into the jury selection process. The trial judge, in his opening remarks to the prospective jurors, used the terms "death penalty" and "life imprisonment." (Record on Appeal (hereafter cited as R.A.) at 157-160). In discussing the manner of the death penalty, the court stated "by death penalty, we mean death by electrocution." (J.A. 157).

During the guilt phase of the capital trial, the prosecution presented evidence conclusively establishing that Simmons

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590.

murdered Ms. Lamb. Because the defense disputed that Simmons had "intent to commit a crime" upon his entry into Ms. Lamb's home, the state was able to present evidence form his confession that the murder of Ms. Lamb was one of a series of brutal attacks on elderly women that covered a fourteen-month period and ended with his arrest the day after Ms. Lamb's death. This evidence demonstrated a proclivity for brutalizing elderly women and sometimes raping them in their own homes and stealing their property. At no time in the guilt phase of the trial did the trial court or either party mention anything about parole or early release. Based upon this overwhelming evidence, the defendant was convicted of murder, burglary in the first degree and petit larceny. (R.A. 1552).

Prior to the beginning of the sentencing proceeding, counsel for the

defense proffered exhibits in an in camera proceeding that the Petitioner had pled guilty on June 19, 1991, in Lexington County, South Carolina, to two counts of criminal sexual conduct in the first degree and one count of burglary in the first degree and received a sentence of thirty (30) years on each count of criminal sexual conduct and life imprisonment on burglary. Defense counsel also called the general counsel of the South Carolina Department of Corrections, Larry Batson, to testify out of the presence of the jury. (J.A. 10-19). Mr. Batson testified that the crimes of murder, criminal sexual conduct in the first degree, and burglary in the first degree were "violent crimes" in South Carolina. (J.A. 11-12). Further, he stated that assuming the person was convicted for murder after a separate sentencing for criminal sexual conduct and

burglary in the first degree not from the same series of events and received a life sentence, the inmate would not be eligible for parole. (J.A. 12-13). Mr. Batson acknowledged that inmates serving life sentences are outside of the confines of the prison on short-term holiday or weekend furlough programs, and work release programs. (J.A. 14). Further, Mr. Batson recognized that their regulations could "certainly be subject to change" which may restrict certain inmates from the programs. (J.A. 14). Furthermore, he stated there are no statutory laws prohibiting an inmate serving a life sentence without parole form being furloughed, being put on work release,[2] or receiving a holiday furlough.

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[2]Pursuant to S.C. Code Ann. Section 24-13-610, an inmate is not eligible for the "extended work release" program even if he has participated in a "work release" program if convicted of murder or criminal sexual conduct in the first or second degree. See also Section 24-13-650 (work

(J.A. 18). Also, he said that he could not say that he would always remain behind bars. (J.A. 18). A stipulation was also presented by counsel for the South Carolina Probation, Parole and Pardon Board that "they will not consider for parole anyone serving a sentence of life without parole." (J.A. 19).[3]

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release program eligibility for violent criminals).

[3]Respondent would submit however the obvious fact that future legislative change could benefit inmates to allow for parole eligibility when at the time the "violent" crime was committed he was not eligible for parole. For example, effective January 1, 1994, a legislative change in South Carolina goes into effect which redefines "violent crimes" pursuant to S.C. Code Section 16-1-60 to require that before an offense be considered a "violent crime," it must have been defined as a "violent crime" at the time of the commission of the crime. Therefore, since the "violent crime" classification was first established in 1986, there are a number of individuals who committed a second or more "violent crime" after 1986 who currently are not eligible for parole. After January 1, 1994, if the initial crime occurred prior to 1986, the inmate will now be eligible for parole consideration despite the fact that at the time of his conviction he was not eligible

In support of his request for certain instructions, the Petitioner also presented an affidavit of Robert Oldendick and survey results from random telephone polling about public opinion on the amount of time a person would have to spend in prison if sentenced to life imprisonment. (J.A. 150-159). The survey did not specifically address the precise phrase "parole," but only whether the sentence meant "they will have to spend the rest of

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because the earlier crime is no longer considered a "violent crime" under Section 16-1-60. 1993 Acts and Joint Resolutions of South Carolina, No. 184, Section 8, Section 266, Section 269, pp. 3229, 3239, 3397, 3399. This same statutory change affected the inquiry in the proceedings in Cavanaugh v. Roller, No. 92-1510, certiorari dismissed as improvidently granted. (U.S.S.Ct. November 30, 1993). Further, the description of an inmate serving a sentence of life without parole may be a misnomer. An inmate in "the second or subsequent violent offender status" of Section 24-21-640 may actually be serving a sentence of life imprisonment without a current expectation of parole consideration, subject to change throughout the duration of his life, as shown by recent statutory changes in South Carolina.

their life in prison or can they be released from prison at some point in the future" and if sentenced to life "about how much time do you think they would have to spend in prison." (J.A. 152-159). The results suggested that 20 percent in the survey thought a life-sentenced inmate would have to serve the rest of his life in prison and 71.6 percent thought he "could be released at some point," without an explanation of the variable causing the release. (J.A. 153).

Defense counsel asked the trial judge to instruct the jury on the provisions of S.C. CODE Section 24-21-640 that:

> The Board of Probation, Parole and Pardon must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction for violent crimes as defined in Section 16-1-60;

and that his earlier convictions of burglary in the first degree and criminal

sexual conduct in the first degree are violent offenses. (J.A. 21-22).

The trial judge inquired of the defense of the effect of the decision of State v. Torrence, supra, which he felt bound by and not public opinion polling. (J.A. 34). It was defense counsel's position that the state law decision in Torrence did not control this factual situation. (J.A. 35-39).

After hearing argument, the trial judge entered his Order denying the Appellant's request to charge. (R.A. pp. 1601-1607). Judge Anderson summarized the Torrence decision and concluded:

> I conclude that Torrence should be applied in this case. Therefore, it is ordered that counsel in the matter sub judice shall not engage in any discussion or reference to parole or parole eligibility or parole ineligibility.
>
> Further, this court will not instruct the jury in the initial charge. In the event that the jury inquiries about the matter, the court will use the procedure

> articulated in State v. John Foster Norris, 328 S.E.2d 3339. The instruction at that time will be as follows: 'You are instructed not to consider parole or parole eligibility. That is not a proper issue for your consideration.
>
> 'The terms "life imprisonment" and "death sentence" are to be understood in their plain and ordinary meaning.'

(J.A. 45-46).

The sentencing proceeding was then held before the jury. The prosecution introduced as evidence of the Petitioner's character the criminal conviction record of the Petitioner concerning his June 19, 1991, guilty pleas in Lexington County for criminal sexual conduct in the first degree involving the June 15, 1990, sexual battery of Estelle Simmons, a seventy-one year-old widow and also involving the August 2, 1989, sexual battery of Marie Furtick and the burglary in the first degree of Ms. Furtick's residence. (J.A. 58-60). Further, the prosecution called

witnesses to describe the physical trauma to Ms. Furtick including massive bruising and "gaping wounds to the chest and buttock area" and the victim declared she had been raped. (R.A. 1658-1659, 1668-1669). A witness described the wounds and trauma to Ms. Simmons' face resulting in her eyes being swollen shut, bruising on her hands and arms, and her statement that she had been raped. (R.A. 1672-1674). Another witness described the trauma to another of the Petitioner's elderly victims, Faris Mims, including that she had been cut and tied up by the perpetrator and that he had attempted to rape her. (R.A. 1676). Photographs of the death scene of Ms. Lamb were also presented into evidence. (R.A. 1677-1681).

In the sentencing phase, the defense sought to mitigate the impact of Simmons' violent actions by presenting a series of

witnesses who described the Petitioner as a nice kid who had been involved in his church and did not appear to be strange. (R.A. 1695-1696). Simmons' mother, family and friends testified to describe the family background and other testimony was presented that Simmons grew up in a dysfunctional family plagued with physical, sexual, and alcohol abuse. (R.A. 1870-1877). A social worker testified that his review of the records revealed he had not been a problem inmate since his arrest and based upon his interviews with him, another inmate and guards, he thought he would be adaptable to prison life. (J.A. 62-63).

Dr. James R. Evans, a psychologist, testified for the defense that Simmons suffered from a "nonspecific dissociative disorder." (J.A. 68). Also, he testified that he was in the borderline intelligence category and was severely abused

physically and sexually as a child. (J.A. 88-89). On cross-examination, the prosecution questioned the intelligence level of the Petitioner based upon earlier higher testing, that on occasion during the testing he attempted to malinger. In conclusion, the prosecution inquired:

> Q. ... Is he a dangerous and mean person?
>
> A. I think that he's dangerous and a dangerous person as long as he goes into a dissociative state, yes, sir, of course.
>
> Q. So, the answer is yes, he is a dangerous person?
>
> A. Yes, sir.

(J.A. 91-92).

In addition to other family members and friends, the defense counsel called a medical assistant from the detention center who had known Simmons since July, 1990, who described him as initially not interacting but since then he had adapted well in prison. (J.A. 94-95). Similar

testimony from two other witnesses was also stipulated. (J.A. 95).

In reply, the prosecution presented testimony contradicting the defense suggestion of a dissociative disorder. (R.A. 1978-1979, 1997-1998). Further, contrary to the conclusions of the social worker, the Petitioner's aunt and grandmother denied having incest with the Petitioner when he was a child. (R.A. 2010-2012).

Later, immediately prior to the jury instructions, the Appellant submitted Defendant's Request to Charge G which stated:

> I charge you that these sentences mean what they say. That is, if you recommend that the defendant Jonathan Simmons be sentenced to death, he actually will be sentenced to death and executed. If, on the other hand, you recommend that the defendant be sentenced to life imprisonment, he actually will be sentenced to imprisonment in the state penitentiary for the balance of his natural life.

> In your deliberations, you are not to speculate that these sentences mean anything different form what I have just told you, for what I have told you is exactly what will happen to the defendant, depending on what your sentencing decision is.

(J.A. 162). The trial judge denied the charge stating:

> You lawyers are not to discuss parole or the meaning of those words. We just use them in their ordinary sense in your presentation. If there is a jury query in that regard, I'm ready to respond under my prior ruling.

(J.A. 96).

The prosecution in its closing argument asked the jury to impose the death penalty because the facts of the case spelled out a picture of a course of conduct "so bent on malice ... so lacking in compassion and social conscience." (J.A. 98). He asserted that the defense case was an attempt to shift the blame and disputed the premise of incest. (J.A. 98-

99). He reviewed his prior assaults and described the issue:

> What is the appropriate punishment for that course of conduct? And again, each one of you indicated that you feel that the death penalty is appropriate in some circumstances. Are these the proper circumstances? I submit to you if not these, then what?
>
> The second reason that you would sentence someone to death ... might be deterrence .... The fact that it will deter him is plenty. That is all we are here to do is to deter him.
>
> His own psychologist yesterday, ... Dr. Evans testified he was "dangerous." The central issue again is whether you will ignore the facts and circumstances surrounding the case and course of conduct of Jonathan Simmons ....

(J.A. 101-102). The prosecution returned in its argument to discuss the version of the criminal acts of Simmons. (J.A. 103-107). He also presented a list of mitigating circumstances that the defense will ask the jury consider but that it need not necessarily adopt them including:

> His ability to adjust and adapt to prison is a mitigating circumstance

> and he has shown no tendency against others as a mitigating circumstance. He's adapted well to prison since he's been in jail. He's treatable in prison. He's capable of helping other prisoners.

(J.A. 108-109). The prosecution observed that the jury's verdict "should be a response of society to someone who is a threat. Your verdict will be an act of self-defense." (J.A. 109-110). Then, he characterized the defense as an attempt to put the blame on society and stated that the jury is "not concerned about how he got shaped. We are concerned about what to do with him now that he is within our midst." (J.A. 110).

In their arguments, the defense immediately defended the conclusions of the dissociative disorder and the dysfunctional family. (J.A. 113-121). Counsel asserted that every prior incident of violent or abnormal conduct was directed at his father or elderly women.

> Is he dangerous? Dr. Evans said he was dangerous. But is he dangerous when he is away from these stressors that promote the dissociative behavior and, of course, he is treatable. That's even another issue. But is he dangerous? He's not going to be dangerous in a prison setting he is not going to be exposed to women.[4] He is not going to be exposed to his father. He is going to be put in an environment where he's not going to be dangerous.

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[4]This statement that he would not be exposed to women in prison was not supported by any defense evidence at trial. Furthermore, it is not supported by fact. According to the published South Carolina Department of Corrections Annual Report 1991-1992, there are 669 black female and 309 white females employed in security positions as of June 16, 1992. These positions include all uniformed personnel of correctional officers and are employed in both male, as well as female, institutions. (Annual Report, p. 88). In addition, there are 382 black females and 672 white females also employed in the prison system in non-security positions. Furthermore, upon information and belief, the current unit manager over the Petitioner's current custody in the Edisto Unit of the Broad River Correctional Institution, also known as Death Row, is a female. The comment is even more dubious when the Petitioner presented the testimony of Susan Perry, a female jail employee, about her contact with Simmons in jail in mitigation. (J.A. 92-95).

(J.A. 121). Asserting that Simmons had a mental condition and was the type of person that was "unable to cope with their sickness," defense counsel asked that he not be condemned to death but for the jury to "return a verdict of incarceration for life." (J.A. 122). The other defense counsel sought to mitigate the "don't blame Jonathan" characterization and asserted:

> We are not asking you that. Your choice is in what way is he going to be punished. That is your choice. Not that he will not be punished. And I would submit to you he is 22 years old. A life sentence is punishment.

(J.A. 125).

The trial judge charged the jury as to its sentencing responsibilities using the phrase to decide whether to sentence the defendant to life imprisonment or to death ... by electrocution." (J.A. 129). Throughout his instructions, the court used the terms "death sentence," "death,"

"death penalty," and "life imprisonment." (J.A. 134-145).

The jury subsequently began deliberating and sent out the following note from the jury:

> Judge Anderson, June 30, 1991
>
> Does the imposition of a life sentence carry with it the possibility of parole?
>
> s/James S. Wright
> Jury Foreperson

Court's Exhibit 19. (J.A. 145, 163). The jury returned to the courtroom where, over Petitioner's objection, the trial judge gave this instruction:

> Thank you, Mr. Bailiff. Mr. Foreman, I received the note and I respond as follows: ... You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

(J.A. 146). Twenty-five minutes after having its question about parole answered in this fashion, the jury returned to the courtroom with a sentence of death. (J.A. 148-150).

2. How the Supreme Court of South Carolina decided the issue presented to this Court.

In the majority opinion, the Supreme Court of South Carolina concluded that the jury instruction given in this case "satisfies in substance appellant's request for a charge on parole ineligibility." State v. Simmons, 427 S.E.2d at 179. (J.A. 170). It initially analyzed the prior decision of State v. Torrence, concluding first that (1) parole is not a proper consideration for a sentencing jury since it is not a mitigating circumstance; and (2) practical problems may arise in the application of the parole statutes. Further, Justice

Chandler's Torrence analysis relied upon the proposition of this Court in California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), that the issue of charging on parole eligibility was solely a matter of state law. Id. at 178. (J.A. 170).

The State Supreme Court concluded the issue in the following analysis:

> In State v. Davis, ___ S.C. ___, 411 S.E.2d 220 (1991), we clarified that despite our ruling in Torrence, a defendant is still entitled, upon request, to a plain meaning charge under State v. Atkins, supra. Although the trial judge erroneously declined to give a plain meaning charge upon request in this case, the error was cured when he properly followed State v. Norris, supra, in answering the jury's question regarding the possibility of parole as follows:
>
> You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

> The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean. State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991); State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989). We conclude a reasonable juror would have understood from the charge given that life imprisonment indeed meant life without parole. We therefore find appellant's argument without merit.

State v. Simmons, 427 S.E.2d at 179. Justice Finney dissented. 427 S.E.2d at 180.

SUMMARY OF ARGUMENT

The Petitioner was not deprived of a due process right to rebut or explain the prosecution's request for the death penalty where he was permitted to present evidence of his character for adaptability to prison life without restriction. The mere possibility that an assertion that if he was sentenced to life imprisonment that it would be without parole eligibility did not rebut or explain the state's argument for death. Nevertheless, jury instructions were given which removed the

speculation about his eligibility for parole from their deliberations. Due process does not require that a capital jury be specifically advised of parole ineligibility or the period of ineligibility.

The instructions given to not consider parole or parole eligibility and to interpret lie imprisonment in its ordinary and plain meaning did not violate the Eighth Amendment. This instruction did not prevent the jury from fully considering relevant mitigating evidence of the capital defendant's character, prior record or the circumstances of the offense. The fact that other states have developed instructions that advise capital juries of parole ineligibility does not require the Court to find either a Due Process or Eighth Amendment violation. The issue of parole eligibility or ineligibility is not a facet of the

defendant's character, prior record, or circumstance of the crime which is mitigating under the Eighth Amendment.

ARGUMENT

I. The trial court did not deprive the defendant of due process of law or violate the Eighth Amendment when it directed the capital sentencing jury not to consider parole or parole eligibility in reaching the verdict of life imprisonment or the death penalty and that the terms life imprisonment and death penalty are to be understood in their plain and ordinary meaning in response to a jury inquiry.

In California v. Ramos, 463 U.S. 992 (1983), the court declared that the Eighth and Fourteenth Amendments did not prohibit a California jury instruction regarding the Governor's power to commute a life sentence but failed to include the

Governor's power to commute a death sentence. In holding "only that the Eighth and Fourteenth Amendments do not prohibit such an instruction," the court noted that many state courts have held it improper for the jury to consider or to be informed -- through argument or instruction -- of the possibility of commutation, pardon, or parole. Id. 463 U.S. at 1012 n. 30. In such recognition, the court stated the following:

> Our conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their states should not be permitted to consider the Governor's power to commute a sentence. It is elementary the states are free to provide greater protections in their criminal justice systems than the Federal Constitution requires. We sit as judges, not as legislators, and the decision to permit juror consideration of possible commutation is best left to the states.[5]

[5]In Ramos, 463 U.S. at 1012 n. 13, the court expressly recognized the South Carolina practice by citing State v. Atkinson, 253 S.C. 531, 535, 172 S.E.2d 111, 112 (1970) ("the legislature

Id. 463 U.S. at 1013-1014. With the clear statement from this Court, states have chosen what course they would take in advising or not advising capital juries of the possibilities of various forms of release from maximum forms of correctional custody in a life sentence including pardon, parole, work release and other forms of lenient treatment from the executive branch and its role, if any, in their capital sentencing structure.[6] The

committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed.")

[6]In Lockett v. Ohio, 438 U.S. 586, 605 (1978), the court recognized there were numerous ways to modify noncapital sentences. "A variety of flexible techniques -- probation, parole, work furloughs, to name a few-- and various post conviction remedies may be available to modify an initial sentence of confinement in noncapital cases." As noted earlier, legislative changes in the law occurring after the conviction can make some benefits, such as parole, available to prisoners where it was not available at the time of their conviction. See also

interests of these states, and of the victims whose rights it must vindicate, ought not be turned aside when the states rely upon an interpretation of the Eighth Amendment approved by this Court, absent demonstration that the earlier cases were themselves a misinterpretation of some constitutional command. Johnson v. Texas, ___ U.S. ___, 113 S.Ct. 2658, 2668 (1993). Vasquez v. Hillary, 474 U.S. 254, 265-266 (1986); Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

In this particular case, South Carolina sought at trial to ensure that the sentencing jury focused its attention on relevant aggravating and mitigating circumstances by directing it upon inquiry

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1981 Acts and Joint Resolutions of South Carolina, Act 100, pp. 333-350. (Act lessened time needed to be served before parole eligibility, allowed for a pardon of a prisoner prior to parole eligibility, created new prisoner release programs defined as "supervised furlough" and "extended work release.")

not to consider parole or parole eligibility in reaching its verdict. The Eighth Amendment requires that the sentencing authority not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Skipper v. South Carolina, 476 U.S. 1, 4 (1986). Furthermore, as the court recognized in Lockett v. Ohio, 438 U.S. 586, 605 n. 12 (1978), "nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." We submit that the trial court's direction not to consider parole eligibility and to consider life imprisonment and death penalty in their ordinary and plain

meaning did not violate either the Due Process Clause of the Fourteenth Amendment or the Eighth Amendment.

A. The trial court's instructions did not violate the rule of Gardner v. Florida, 430 U.S. 349 (1979).

The Petitioner contends that he was denied due process in his capital murder trial because the South Carolina trial judge refused to specifically inform the capital sentencing jury that if the jury did not reach a death sentence, the Petitioner would be sentenced to life without the possibility of parole. He contends that he was entitled to this instruction under due process of law because the prosecutor argued the Petitioner's dangerousness as a reason for death. He claims the fact that he would not be eligible for parole somehow rebutted that claim of dangerousness and he was prevented the opportunity from

making that showing. As will be shown, the state court fairly addressed that claim in concluding both that the "do not consider parole or parole eligibility" and "life imprisonment and death penalty" are to be understood in their plain and ordinary meaning" satisfied, in substance his request for a charge on parole ineligibility and that a reasonable juror would have understood the supplemental charge given that life imprisonment meant life without parole. (J.A. 146, 170-171). Further, the prosecution's argument on dangerousness of Simmons was based upon his violent acts before the jury and the testimony of the defense psychologist and was not directed toward any particularly locale or the risk of early release, but rather toward his continued existence. Contrary to the bare assertion of the Petitioner, the existence or lack of parole eligibility does not rebut his

dangerousness in general or in this record. Due process has not been violated.

In Gardner v. Florida, 430 U.S. 349 (1979), the court concluded that the Due Process Clause of the Fourteenth Amendment was violated when a judge was provided prior to the sentence with a presentence report including confidential information not disclosed to the defendant or his counsel. The trial judge imposed the death sentence rejecting the jury's advisory recommendation for life and stated he was relying upon information in the report. The court concluded that Gardner "was denied due process when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." 430 U.S. at 362.

In Skipper v. South Carolina, 476 U.S. 1 (1986), the court was faced with a

situation where the state court precluded testimony of two jailers and a visitor that the capital defendant had made a good adjustment to prison. The court concluded under the Eighth Amendment that this was relevant mitigating evidence of his character. The court noted the relevance of evidence of probable future conduct in prison as a factor in mitigation of the offense was heightened in this case because the prosecutor urged the jury to return a death sentence because he could not be trusted to behave if he were to return to prison. Since the prosecutor specifically relied upon a prediction of future dangerousness in asking for the death penalty, the court concluded that it was not only the rule of Lockett that required he be afforded an opportunity to introduce evidence on this point; "it is also the elemental due process requirement that a defendant not be sentenced to death

on the basis of information which he had no opportunity to deny or explain." Skipper, 476 U.S. at 5, n. 1. (Citing Gardner, supra, 430 U.S. 349, 362).

Due process was not violated in this case because the Petitioner was sentenced on the basis of information that he had the opportunity to either deny or explain. Clearly, the due process mandates of Gardner and Skipper were fully complied with in the sentencing proceeding. First, the state's argument for death was never that he did not pose a threat to prison staff or inmates, as the Petitioner now suggests. Rather, it was that Simmons had recently become a very violent person as shown by the violent attacks he was convicted of previously and further that the defense psychologist had admitted, that he was a dangerous person and that death would deter Simmons. (J.A. 101-102). At no time did the prosecution

allude to the possibility that Simmons would ever be subject to any custodial release or that he would ever be in the society. Since the defense psychologist testified in his opinion Simmons was "dangerous," (J.A. 91-92), clearly the prosecution's use of the phrases "threat" and the verdict as an act of "self-defense," did not deprive him of due process, where the opportunity rebut or explain was clearly presented.[7]

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[7]The Petitioner also takes out of context the prosecution's use of the phrase "in our midst" by suggesting that its use suggested the potential for release. (Brief of Petitioner 4, 15). Clearly a reasonable juror would have recognized that this comment was solely directed toward the fact that he was present to face sentencing. This "court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through the lengthy exhortation will draw that meaning from a plethora of less damaging interpretations." Boyde v. California, 494 U.S. 370, 110 S.Ct. ___, 108 L.Ed.2d 316, 332 (1990), (citing Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

In Skipper, the prosecutor violated due process when the prosecution asserted that the defendant would not behave if he were simply returned to prison but the jury was prevented from hearing evidence that he would not pose a danger if spared, but incarcerated, i.e., future adaptability to prison. Here, such evidence of the Petitioner's behavior in the jail setting and testimony about predictions of his future behavior were presented for the jury's consideration. Clearly then, unlike Skipper, the prosecution's argument of dangerousness was given the opportunity to be explained or rebutted by the defense's presentation and argument for life. (J.A. 61-63, 92-95, 121).

He contends that the effectiveness of his defense depended upon the assertion that the Petitioner was currently ineligible for parole and according to

him, would actually remain in prison if given a life sentence. (Brief of Petitioner, p. 5). The problem with the Petitioner's due process claim is that it was legally inaccurate. First, whether or not a person is parole eligible or ineligible does not explain or rebut dangerousness or prior violent crimes. The status of parole ineligibility has nothing to do with whether a particular inmate will be violent or not. Furthermore, the issue on whether a particular inmate is or is not parole eligible does not mean that he won't be dangerous or remain in prison. See State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985) (convicted murderer kills another inmate housed on Death Row); State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985) (inmate on unsupervised prison work assignment delivering food to various correctional institutions murders a

female). State v. Middleton, 288 S.C. 1, 339 S.E.2d 692 (1986) (inmate escapes from prison work detail and murders two females).

Furthermore, the fact that an inmate is not parole eligible does not mean that he would never be released from prison. S.C. Code Ann. Section 24-21-940, et seq. (1989), allows the Board of Probation, Parole and Pardon Services to pardon an inmate if he can produce evidence of the most extraordinary circumstances.[8] Further, these inmates are statutorily eligible for "work release" programs. S.C. Code Section 24-13-650. But see S.C. Code Section 24-3-130 (inmates convicted

[8]Anticipated concerns about prison overcrowding with life without parole inmates have been recognized by commentators as a problem. One suggested solution was the commutation of elderly inmates serving without parole. Julian H. Wright, Jr., Life Without Parole: An Alternative to Death or Not Much of a Life at All?, 43 Vanderbilt L. Rev. 529, 563 (1990). Section 24-21-940, 970 would allow for such use of a pardon.

of criminal sexual conduct not eligible to be used on state highway projects). Testimony was presented in camera that it could not be said he would always remain behind bars. (J.A. 18). Similarly, future changes in the law might allow for parole or lessening of a custody classification to further enable similarly situated inmates to be released. See e.g. Knox v. Collins, 928 F.2d 657, 660, n. 2 (5th Cir. 1991) (Texas parole eligibility time reduced since crime).[9]

Contrary to the Petitioner's claims, the presentation on the issue of dangerousness was far from one-sided or inherently unfair. His complaint that the

[9]It has also been stated that life without parole may create "super-inmates" who without hopes of release through legal means may decide to seek freedom through illegal and violent means -- taking hostages, escaping and rioting -- placing guards and others in the prison at greater person risk and become heightened disciplinary problems. Wright, supra, n. 8, at 564-65.

use of the prior convictions as reasons to sentence him to death denied him due process because the convictions allegedly diminished any threat of similar acts of violence by him in the future is wholly inaccurate. Accepting for the sake of argument his premise that he will only hurt females, there was no evidence presented in the record that females are not located in the prison setting. To the contrary, he presented evidence that they were in the correctional setting by the testimony of the female jail employee. (J.A. 91-95). Also, evidence was presented in camera that an inmate serving a life sentence in prison could be out of the prison environment while on a furlough or work release and the statutory laws do not prohibit an inmate without parole eligibility from being on these programs. (J.A. 15-17). Also, he was able, unlike Skipper, to attempt to make a presentation

of non-violence in the prison and adaptability to prison. Also, the Petitioner was able to argue to the jury that he is going to be put in a prison setting and will not be dangerous because he will not be exposed to the stressors that caused the violence. (J.A. 121). His opportunity to rebut or explain was not denied.

B. The trial judge's answer to the jury's parole inquiry was appropriate.

During the deliberations, the jury sent out an inquiry asking "does the imposition of a life sentence carry with it the possibility of parole." (J.A. 145, 163). The trial judge responded in accordance with South Carolina law as follows:

> You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence

> are to be understood in their plain and ordinary meaning. The terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning.

(J.A. 146). The Petitioner contends that the trial court's response to the jury inquiry was confusing and created a reasonable likelihood that the jury would not have properly understood or followed the instruction under the Boyde v. California, 494 U.S. 370, 380 (1990) test. The Supreme Court of South Carolina properly analyzed the instructions and rejected his claim of due process violation.

1. The cautionary instruction.

In the first two sentences of the trial court's response, the judge specifically instructed the jury "not to consider parole or parole eligibility in reaching your verdict ... that is not a proper issue for your consideration.." He asserts that because of this instruction

not to consider parole or parole eligibility, that the jury was told there was parole eligibility and rejected the direction and considered parole, relying upon dicta in State v. Smith, 298 S.C. 482, 381 S.E.2d 724 (1989). The reliance upon Smith by the Petitioner is misplaced because his current attempt to parcel the sentences or words in isolation ignores their impact in the context they were given. First, the Petitioner left out of his recitation of the Smith case the fact that "neither the Johnson jury nor the Plemmons jury was instructed, as was Smith's jury that "life imprisonment was to be understood in its ordinary and plain meaning." State v. Smith, 381 S.E.2d at 727. Further, the court stated from the instruction "the only logical conclusion available to the reasonable juror from the court's instructions was that Smith would

not be parole eligible if sentenced to life in prison." Id.

This cautionary instruction not to consider parole or parole eligibility, matters not presented in evidence, in a jury's deliberation was sufficiently specific to address the inquiry about whether Simmons would be eligible for parole. A reviewing court will normally presume that a jury will follow an instruction to disregard inadmissible evidence, Greer v. Miller, 483 U.S. 756, 766 (1987), unless there is an overwhelming probability that the jury would be unable to follow the court's instructions,, Richardson v. Marsh, 481 U.S. 200 (1987), and a strong likelihood that the effect of the disregarded evidence would be "devastating" to the defendant, Bruton v. United States, 391 U.S. 123 (1968). Accord U.S. v. Jones, 907 F.2d 456 (4th Cir. 1990).

We submit there is no reason to believe, as Petitioner suggests, that after the instructions to disregard parole that the jury was incapable of obeying the instructions. Other courts have reasonably concluded that similar instructions not to consider parole would be followed. In King v. Lynaugh, 850 F.2d 1055, 1060 (5th Cir. 1988), the court evaluated a similar cautionary instruction and concluded:

> The state aptly characterizes this instruction as stating "life means life." If the jurors paid attention during voir dire and followed the trial court's charge, as we generally presume they do, any pre-existing misconception about parole law would have been ignored.

Similarly, in State v. Robbins, 319 N.C. 465, 356 S.E.2d 279 (1987), the North Carolina court concluded under a virtually identical situation a similar cautionary instruction upon a jury inquiry on parole would have been followed by the jury.

Accord Quick v. State, 353 S.E.2d 497, 503 (Ga. 1987); Commonwealth v. Strong, 563 A.2d 479, 486 (Pa. 1989); Jones v. State, 843 S.W.2d 487, 495 (Tex. Cr. App. 1992); Peterson v. Murray, 904 F.2d 882, 886 (4th Cir. 1990); Andrade v. McCotter,, 805 F.2d 1190, 1192 (5th Cir. 1986). Cf. People v. Gordon, 792 P.2d 251 (Cal. 1990) (defendant not entitled to an instruction that life without parole meant he would remain in prison his entire life).

The jury was directly instructed not to consider parole or parole eligibility in its continued deliberation. There is no cognizable reason to conclude these "do not consider" instructions were being ignored by the jury in every case it has been given. Simply put, the Supreme Court of South Carolina was correct in concluding the jury heeded this instruction, as well as the other

instructions, and fairly sentenced Simmons disregarding parole.

2. The "plain and ordinary meaning" instruction.

The Petitioner assumes that the jury will ignore the initial sentences of the cautionary instruction not to consider parole or parole eligibility and will consider parole in determining life imprisonment and the death sentence in their "plain and ordinary meaning." His logic is faulty on a number of grounds. First, the jury is presumed to follow the clear and specific instructions not to consider parole or parole eligibility as set forth in the previous section. Second, the Petitioner is clearly misapplying the standard of Boyde v. California, supra, in its inquiry about the instructions. As the court in Boyde stated:

> Jurors do not sit in solitary isolation booths passing

> instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in light of all that has taken place at trial likely to prevail over technical hairsplitting.

Boyde,, 108 L.Ed. at 329. The Boyde "reasonable likelihood" standard rejects a test of how a single hypothetical "reasonable" juror could or might have interpreted the instruction. Rather the standard is whether or not there is a reasonable likelihood that the jurors in the Petitioner's case rejected the directive from the court not to consider parole eligibility in its conclusion and instead sentence the Petitioner to death without considering relevant mitigating evidence. The test under Boyde is not to engage in technical parsing of the language of the instructions but instead to approach the instruction as a jury

would -- with a commonsense understanding of the instructions in the light of all that has taken place. Johnson v. Texas, 113 S.Ct. 2658, 2669 (1993). Clearly, the constitutional test is not whether the court gave the best or clearest instructions. Here, in light of the fact that the concept of parole was wholly left out of any evidentiary presentation, argument of counsel, or initial instruction by the court, the subsequent inquiry about parole eligibility and the trial court's strong response that it should not consider parole eligibility and to consider a life sentence in its plain and ordinary meaning would have led the jury to treat the life sentence as life imprisonment without consideration of parole eligibility, i.e., "life means life." King v. Lynaugh, 850 F.2d 1055, 1060 (5th Cir. 1988). The Supreme Court of South Carolina's analysis was sound.

a. Public opinion and jury surveys.

Simmons seeks to bolster his assertion of jury misunderstanding by the use of public opinion polls and juror surveys on what he purports to be the meaning of life. This course is neither persuasive nor relevant to this Court's interpretation under Boyde as to how the actual jurors would have interpreted the instructions. Prior expert analysis of jury instructions in attempts to demonstrate how a reasonable juror would have interpreted instructions or concepts is simply not relevant. In rejecting a similar attempted showing of various experts concerning an interpretation of mitigating instructions in a North Carolina capital case, the Fourth Circuit cogently stated:

> We agree with the district court that the proffered affidavits were not relevant to the determination of the constitutionality of the instructions. The interpreta-

> tion of instructions given by seven academics, employed eight years after the trial, are irrelevant. The result of a test given North Carolina would not enlighten the court as to how North Carolina would not enlighten the court as to how a reasonable juror, who had heard three weeks of testimony, jury arguments from the attorneys, and the complete charge of the judge, would have interpreted a few sentences in the charge.

MacDougall v. Dixon, 921 F.2d 518, 532-533 (4th Cir. 1990). Accord Jeffries v. Blodgett, 988 F.2d 923, 931 (9th Cir. 1993).

It has never been a function of any "reasonable likelihood" analysis of jury instructions to engage social science expertise on how the jury decided the case. An element of our jury system has been insulation from how juries actually decide cases. Jurors may not come and impeach their verdict by assertions of uninformed deliberations. Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993). Courts invoke a presumption that

jurors understand and follow their instructions. See Parker v. Randolph, 442 U.S. 62, 73 (1979) (plurality opinion) ("A critical assumption underlying the system of trial by jury is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.") See Francis v. Franklin, 471 U.S. 307, 324-25, n. 9 (1985).

The Seventh Circuit rejected a study of potential jurors interpretation of facts and instructions in Gacy v. Welborn, supra. In concluding that the use of such studies to evaluate and challenge instructions (or overrule prior precedent) was baseless, the court concluded:

> As there are no perfect trials, so there are no perfect instructions. How best to convey the law to lay persons

> sitting on juries is in the end a question for state legislatures and trial courts to resolve .... The jury is a means to resolve disputes, not a waystation by which the controversy at trial is transported to a higher level of generality as a social science dispute about juries. Gacy's jury was instructed within the wide bounds set by the Constitution.

Gacy, 994 F.2d at 312. The test is not whether the instructions given could have been better or more accurate, but whether they complied with the Constitution. See e.g. Mu'Min v. Virginia, ___ U.S. ___, 111 S.Ct. 1899, 1905 (1991) ("to be constitutionally compelled, it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these particular questions must render the defendant's trial fundamentally unfair.") This Court should not turn the responsibility in reviewing instructions for constitutionality to social scientists or public opinion

surveys. It clearly has not allowed for it to be done in the past. Gacy, supra, at 314. The Boyde test adequately addresses the issue.

As stated previously, the public opinion survey submitted at trial failed in two critical areas -- it failed to distinguish between the tested item of "release" with the untested item of parole or parole eligibility and it failed to address the issue presented as to how the same testers would have responded if they received the jury instruction given of "do not consider parole and parole eligibility and life imprisonment and death sentence are to be understood in their plain and ordinary meaning." (J.A. 145, 153-159). Even without the ameliorating language, over 20 percent initially responded that he would have to spend the rest of his life in prison as opposed to being released [not paroled]. (J.A. 153).

The Petitioner's reliance upon the results of the survey of Theodore Eisenburg and Martin T. Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 Cornell L.Rev. 1 (Nov. 1993), is even more misleading. This purports to be a survey of 114 actual jurors drawn from 31 cases tried between 1986 and 1992. Despite not having results from the remainder of the 372 jurors, he purports to use it to show that jurors misunderstand the concept of life imprisonment. What, in fact, it may show is that the jurors recognize that there were alternatives to parole available for earlier "release" from close confinement and does not support his underlying due process claim. This is because, again, the particular instructions the jurors received were not used in the analysis. This is critical because in South Carolina from August 24, 1987, to May 20, 1991,

South Carolina capital jurors could have been told about specific parole eligibility of either 20 years or 30 years for an inmate sentenced to life. See State v. Atkins, 293 S.C. 294, 360 S.E.2d 302, 305-306 (1987); State v. Torrence, 305 S.C. 45, 405 S.E.2d 315 (1991). Simply put, these tested pools of jurors may have been instructed on parole ineligibility for either 20 or 30 years. To now assert they misunderstood the meaning of life in their case is without foundation. His reliance on such speculation, other cases (or lack of memory) should not be used to undermine the clear, accurate, and possibly different instructions in this case.[10]

[10]The use of national public opinion surveys is even less useful to suggest that this set of jurors would have understood the instructions to mean life imprisonment until parole. See e.g., Frank A. Benneck, Jr., The Public, The Media, and the Judicial System, 7 State Ct. 4, 10 (1983). (Article states that "most Americans know that if a convicted

The use of public opinion surveys or jury polls ignore the appropriate standard of review for ambiguous jury instructions in Boyde. Here, the jury was given a response to their inquiry about the possibility of parole which clearly apprised them to not consider parole eligibility and treat life imprisonment in its plain and ordinary meaning. The survey of other jurors or the public at large is not relevant making that decision where they were not exposed to the same trial, argument, or instructions. This

criminal receives a life sentence," he will not necessarily spend the remaining years of his life in prison." Also, it reveals that public opinion suggests that 45 percent of the public think a district attorney's job is to defend an accused criminal who cannot afford a lawyer. Also, it suggests that 81% of the public think once someone is convicted he can always appeal his case. Cf. Caldwell v. Mississippi, 472 U.S. 320 (1985).)

Court should not rest its decision on such speculative results.[11]

2. The instruction in context did not deny due process.

In conclusion, the instruction given after the jurors' inquiry did not deprive Simmons of due process of law. The state trial judge, in accordance with state law, precluded the state and the defense from injecting the specter of parole or early release into the sentencing proceeding. When the Petitioner's dangerousness was presented through his past violent conduct, the Petitioner was able to either

[11]The Petitioner further seeks to glean some interpretation of a life sentence from earlier legislative debate on whether to increase parole eligibility for murder from 20 years to 30 years or without parole. It reveals nothing as to this instructional issue except that there were divergent feelings on the death penalty and the establishment of parole. Rather, it would reveal that when a person has a violent prior conviction, like Simmons, he would not be eligible for parole since it enacted S.C. Code Section 24-21-640.

explain through expert testimony or deny. the proffered rebuttal of parole ineligibility did not rebut dangerousness.

Further, the proper preclusion by the trial court of the concept of parole similarly prevented the prosecution from suggesting possibility of release through correctional programs, pardons, escape, or an act of the court system. Clearly, he was not denied the opportunity to explain. Further, after the jury made its request, the instruction clearly suggested to the jury that life meant life imprisonment and it was not to consider parole eligibility. (J.A. 170-171). This plain response complied with state law and addressed the issue. His claim to the contrary is without support.

The Petitioner further seeks to suggest some improper motive on the prosecution's position at trial concerning the propriety of the plain meaning

instructions as opposed to the Petitioner's requested instruction. It cannot be questioned that the State, at trial as well as in the appeal, was asserting compliance with state law and procedure as established in State v. Matthews, supra, and State v. Torrence, supra. The proper state procedure was that parole and parole ineligibility should not be injected by the parties in a capital trial and that after Torrence, the plain meaning instruction was the appropriate instruction.

Due process was not denied because the jury was given accurate information -- that life imprisonment was to be understood in its plain and ordinary meaning, i.e., life means life. The jury was never told by the judge or the prosecutor that life meant life with parole eligibility. In fact, the jury was

told just the opposite -- do not consider parole eligibility.

The timing of the instructional request by the jury cannot lead to a different conclusion. He asserts that because the jury asked the question about parole during its deliberations, "the jury had likely concluded that a no parole-eligible sentence could adequately protect society." (Brief of Petitioner, p. 27). How he comes to this speculative belief and reasoning is not supported by the record. All that the court can legitimately gather is that the question was asked and the court's response was given. It can also be assumed that the response was given before the jury rendered its verdict and applied the law as given.[12]

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[12]In State v. Bey, 610 A.2d 814, 841 (N.J. 1992), the state court found no error in delay in answering question about a capital defendant's potential for parole eligibility where jury returned verdict of

II. The Eighth Amendment does not entitle a capital defendant to be informed of his ineligibility for parole which does not relate to his character, prior record, or the circumstances of the crime.

In the earlier argument, the Respondent asserted that the jury instructions properly advised the capital defendant that his sentence of life imprisonment meant life in its ordinary and plain meaning. The jury received accurate information and did not consider parole. The resolution should also remove the basis for his argument under the Eighth Amendment since the jury received in substance what he requested. For this threshold reason, the assertion under the Eighth Amendment must be denied.

Assuming arguendo that the issue remains, we submit that an analysis of

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death without the answer to its parole question.

Lockett v. Ohio, supra, does not mandate that a jury be apprised that it can consider the precise terms of the sentence, here arguably life imprisonment with the possibility of parole, as a relevant mitigating evidence to render a "reasoned moral response."

A. Lockett v. Ohio and the development of relevant mitigating evidence.

In Lockett v. Ohio, 438 U.S. 586 (1978), the court was faced for the first time with considering in a capital case which facets of an offender or his offense is deemed "relevant" in capital sentencing and what degree of consideration of "relevant facts" it would require. The court concluded "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any

aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. 438 U.S. at 605. The court noted importantly that nothing it said limited the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense. Id. 483 U.S. at 605 n. 12. The court determined that the Eighth Amendment was violated because it limited the desirable function of individualized sentencing. The Ohio statute prevented the sentencer in a capital case from giving independent mitigating weight to aspects of the defendant's character and record and to the circumstances of the offense proffered in mitigation. Particularly, the Ohio statute had limited mitigation to only three specified factors

-- whether the victim induced or facilitated the offense, whether the defendant acted under duress or coercion, and whether the murder was the product of mental deficiency. The court concluded that if any of these were not found, the law mandated the death sentence. Id. at 608. The court concluded that the Eighth Amendment was violated because these statutory factors would not have allowed relevant mitigating evidence to be considered to affect the sentencing decision which was presented at the trial -- the absence of direct proof that the defendant intended to cause the death of the victim, consideration of her relatively minor role in the offense, and her age (twenty-one years old). Id. at 608. The court concluded that the limited range of statutory mitigating circumstances which could be considered under Ohio law was incompatible with the

Eighth Amendment. The court stated: "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."

Similarly, in Woodson v. North Carolina, 428 U.S. 2280 (1976), the plurality of this Court held that a mandatory death penalty was not a permissible response to the problem of arbitrary jury discretion because it lacked individualized sentencing. It stated "the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. at 304.

The rule in Lockett derived from this Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all. By focusing the sentencer on the characteristics of the offender who committed the crime, the court concluded that justice requires that there be taken into account the circumstances of the offense and the character and propensity of the offender. This will lead to a proper consistency and reliability in the process according to the Court.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the court applied the rule of Lockett to strike down a conviction where it concluded the sentencer was precluded from considering relevant mitigating evidence -- the defendant's violent family background -- and the appellate court supported it by concluding that the family background evidence was not relevant

because it did not tend to provide a legal excuse from criminal responsibility. Id. at 113. The court concluded that the evidence Eddings offered was relevant mitigating evidence. The court noted his youth of sixteen years, evidence of a difficult family history including beatings from a harsh father, and a severe emotional disturbance described as a sociopathic or antisocial personality, as the relevant evidence. Id. at 115.

The court returned to the question of what is relevant evidence in mitigation is accessing a defendant's role in the circumstances of the crime in Enmund v. Florida, 458 U.S. 782 (1982). In reliance on Lockett, the court noted the difference between those who actually killed and robbed and the other participants. "The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on

individualized consideration as a constitutional requirement ... which means that we must focus on the relevant facets of the character and record of the individual offender." Id. at 798.

The rule of Lockett was applied in Skipper v. South Carolina, 476 U.S. 1 (1986), to conclude that the defendant was entitled to a new trial because evidence of his adaptability to prison was relevant mitigating evidence. The particular evidence the court deemed to be relevant under Lockett was evidence that he had been a well-behaved and well-adjusted prisoner for the seven months and favorable inferences could have been drawn regarding his character and probable future conduct if sentenced to life in prison. The court concluded "there is no question but that such inferences would be"mitigating" in the sense that they might serve "as a basis for a sentence

less than death." Id. at 5 (citing Lockett).

Recognizing that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose," the court in Skipper determined that evidence of past conduct as indicative of future conduct as an inmate was not an undesirable element of criminal sentencing. Further, since evidence that a defendant would pose a danger in the future to the community if not executed, may be an aggravating factor, the court concluded that evidence that the prisoner would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under Eddings, such evidence may not be excluded from the sentencer's consideration. The court stated that the evidence was admissible for the purpose of showing the

jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment. Id. at 7. The court did note that not all facets of a defendant's ability to adjust to prison life are relevant and mitigating. Id. at n.2 (evidence of personal hygiene is irrelevant).

In Hitchcock v. Dugger, 481 U.S. 393 (1987), the court concluded that a Florida advisory jury in a capital case was precluded from considering and the sentencing judge refused to consider evidence of nonstatutory mitigating circumstances. Despite the presentation of evidence in mitigation that the defendant, as a child habitually inhaled gasoline, that his mind wandered, that he came from a large and poor family whose father had died and that he was

affectionate to his family and argument that his youth, lack of prior criminal or violent behavior, his potential for rehabilitation and surrender to authorities, the court found the rule of Lockett was violated because the trial court limited its consideration to the certain enumerated statutory mitigating circumstances which did not include consideration of any of the evidence other than his youth. Relying, upon Skipper, supra, the court concluded that the death sentence was invalid.

Similarly, in Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716 (1987), the court concluded that the rule of Lockett was again violated by a Nevada law that established a mandatory sentence of death for a prisoner who was currently serving a sentence of life without the possibility of parole and was convicted of a murder while serving that sentence. In Shuman,

the prior sentence of life without parole was not suggested to carry the classification of "relevant mitigating circumstance" which could have continued if again sentenced to life. To the contrary, it suggested that the "life-term inmate" designation did not reveal anything about the inmate's character and moral culpability which may vary depending upon the circumstances of the offense and characteristics of the defendant such as youth, the influence of drugs or emotional disturbance upon his behavior, and circumstances in the conduct which he may believe provided a moral justification for the conduct. Id. 107 S.Ct. at 2726-27. "In Shuman's case, a sentencing authority may find relevant his behavior during his fifteen years of incarceration, including whether the inmate murder was an isolated incident." Id. The court also noted that there was no reason to believe that

listed statutory mitigating circumstances in Nevada (which did not specify a sentence of life without parole as mitigating, could not be applicable to Shuman's situation. Pertinent to the argument in this case, the court noted that a "sentence of life with possibility of parole may not ultimately mean in Nevada what it seems to say." Id. 107 S.Ct. 2726 n. 11. The court noted that some inmates who had been sentenced earlier to life without parole were, in fact, currently on parole or had their sentences commuted by a Pardon Board. The court stated that it "did not mean to suggest that such a program is not appropriate, it does indicate, however, that in some cases a prison's rehabilitative efforts appear to yield positive results." Id. Whatever the merits of the court's social analysis, it acknowledged the fact that "most life-term

inmates in this country have a realistic expectation of parole." Id. (citing Acker, Mandatory Capital Punishment for the Life Term Inmate Who Commits Murder, 11 New England J. Crim. and Civ. Confinement 267 at 321-324 and 289 n. 14).

In Franklin v. Lynaugh, 487 U.S. 164 (1988), the court concluded that "lingering doubts" or "residual doubts" about a capital defendant's guilt were not constitutionally relevant mitigating evidence. The plurality determined that the rule of Lockett on relevant mitigating evidence did not "mandate reconsideration by capital sentencing juries of their residual doubts over a defendant's guilt.

> Such lingering doubts are not over any aspect of the defendant's "character," "record," or a "circumstance of the offense." This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

Id. at 174. In her concurring opinion, Justice O'Connor asserted that the Court had defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the offense, that may call for a penalty less than death. Id. at 188 (O'Connor, J., concurring) ("residual doubt" is not a fact about the defendant or the circumstances of the crime). Further, the fact that some states had adopted capital sentencing procedures that allowed defendants to enjoy the benefit of doubts that linger from the guilt phase of the trial did not make such a presentation constitutionally required. Id. at 173, 188.

The rule of Lockett was again addressed in Penry v. Lynaugh, 492 U.S. 302 (1989), where the court concluded the particular instructions given to the jury did not allow for the jury to consider and

give effect to the mitigating evidence of the defendant's mental retardation and abused background. The Eighth Amendment was violated because the jury was not provided with a vehicle for expressing its "reasoned moral response" to the mitigating evidence concerning his "character or record or the circumstances of the offense." Penry, supra, 109 S.Ct. 2947-2952.

In Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190 (1990), the court concluded that California instructions did not prevent consideration of relevant mitigating evidence. The court found that the catch-all circumstance allowed for consideration of his character, including his evidence that he had won a prison dance contest to suggest that he could live a useful life behind bars and was artistic. 110 S.Ct. 1199 n. 5. See also Blystone v. Pennsylvania, 494 U.S. 299

(1990). In Johnson v. Texas, 113 S.Ct. 2658 (1993), the court held that the Texas pattern instruction on future dangerousness based on probability of violence constituting a continuing threat to society allowed for adequate consideration under Lockett of the defendant's youth. "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and reckless that may dominate in younger years can subside," according to the court. Id. 113 S.Ct. at 2669. The court, however, recognized that the fact that some jurors may view the fact of youth as aggravating rather than mitigating did not mean the rule of Lockett was violated. The issue under the Eighth Amendment was whether the mitigating evidence is "within the effective reach of the sentencer." Id.

(citing Graham v. Collins, 113 S.Ct. 892 at 901).

B. The application of Lockett and the exclusion of defense offered evidence.

In Lockett, the court acknowledged that evidence not bearing on a defendant's character, prior record, or circumstances, may, consistent with the Eighth Amendment, be excluded is irrelevant. Both state and federal courts, applying the Lockett rule, have equally recognized that the Eighth Amendment is not violated every time one state reaches a different conclusion from a majority of its sister states over how best to administer its laws. Spanziano v. Florida, 468 U.S. 447, 464 (1984). As the court has several times stated, it is unwilling to say that there is any one right way for a state to set up its capital sentencing scheme. Id. See California v. Ramos, supra. The court recognized that the fact that some states

allow for "lingering doubt" evidence did not mean that its exclusion in some state sentencing schemes violated the Eighth Amendment. Franklin v. Lynaugh, supra, 487 U.S. at 176-177.

Courts have refused under Lockett to accept capital defendant's characterization of some evidence as mitigating or relevant in its own sentencing structure where the evidence did not focus upon the character of the particular defendant, his prior record, or the circumstances of the crime. For example, courts have rejected the following evidence as irrelevant: pain associated with execution, Swindler v. Lockhart, 693 F.Supp. 760 (E.D. Ark. 1988); Shriner v. Wainwright, 715 F.2d 1452, 1456 (11th Cir. 1983), a minister's opinion on biblical teachings and ethical considerations about the death penalty, Evans v. Thigpen, 631 F.Supp. 274 (S.D.

Miss. 1986); evidence of a co-defendant's plea bargain or life sentence, Brogdon v. Blackburn, 790 F.2d 1164 (5th Cir. 1986); People v. Dyer, 753 P.2d 1, 26-27 (Cal. 1988); People v. Page, 620 N.E.2d 339 (Ill. 1993); lack of deterrent value of sentence, Granviel v. Lynaugh, 881 F.2d 185 (5th Cir. 1989); evidence that the same defendant had pled guilty to an unrelated murder and received a life sentence, Evans v. McCotter, 790 F.2d 1232 (5th Cir. 1986); a journalist's testimony in opposition to the death penalty, Scott v. Dugger, 891 F.2d 800, 806 (11th Cir. 1989).

These cases generally recognized the role and right of the state court to establish rules governing the admission of relevant mitigating evidence. Generally looking at whether the proffered evidence relates to a defendant's prior record, character, or the circumstances of the

offense, the courts will make their determination as to whether the evidence is constitutionally relevant under Lockett and Skipper.

C. Evidence of parole or parole ineligibility is not relevant mitigating evidence pursuant to Lockett.

In California v. Ramos, supra, the court recognized a principle of deference to the state courts and legislatures. In holding that the Eighth Amendment did not prohibit instructions that do advise capital juries of clemency, it also stated that the decision was not intended to override the contrary judgment of many states that do not permit the jury to be apprised of parole possibilities. Id. 463 U.S. at 1014. As the court stated, it is elementary that states are free to provide greater protection than the Eighth Amendment requires. The fact that South Carolina, as well as other states, may

have chosen not to do so does not create a cognizable Eighth Amendment violation.

Parole ineligibility or eligibility is irrelevant under Lockett and Eddings to the capital sentencing process because it does not evidence the particular defendant's prior record, personal characteristics, or the circumstances of the crime. Accord King v. Dugger, 555 So.2d 355, 359 (Fla. 1990), People v. Coleman, 544 N.E.2d 330 (Ill. 1989); State v. Robbins, 356 S.E.2d 279 (N.C. 1987); Commonwealth v. Henry, 569 A.2d 929, 941 (Pa. 1990); State v. Torrence, supra, 406 S.E.2d at 323 (S.C. 1991); Quick v. State, 353 S.E.2d 497 (Ga. 1987); State v. Copeland, 530 So. 2d 526 (La. 1988); Mueller v. Commonwealth, 422 S.E.2d 380 (Va. 1992); Peterson v. Murray, 904 F.2d 882, 886-87 (4th Cir. 1990); O'Bryan v. Estelle, 714 F.2d 365, 388-89 (5th Cir. 1983). See e.g., U.S. v. Chandler, 996

F.2d 1073 (11th Cir. 1993) (Skipper does not require federal capital jury to be advised of sentencing possibility of life without possibility of parole).

The Petitioner's argument that parole ineligibility or that parole itself is a mitigating circumstance under Lockett is misplaced. He claims that parole ineligibility is an integral part of his Skipper evidence of future adaptability to prison life. Since the jury was not instructed on his ineligibility for parole it somehow minimized the significance that the jury would have accorded to his alleged probability of good behavior in prison. Apparently, this is based upon his suggestion that he would remain in prison through the duration of his life.

While we contend the instructions given to the jury accurately portrayed life imprisonment as life in prison, the picture the Petitioner seeks to suggest to

capital juries would be inherently misleading. First and foremost, at the time of the trial, no state agency had ever determined that Simmons was going to be serving a sentence of life without the possibility of parole, despite the fact that he had earlier pled guilty and been sentenced to a violent crime prior to this trial. The importance of that distinction is that the power to make that determination did not rest with the judiciary, but was solely vested in an executive branch agency, the South Carolina Board of Probation, Parole and Pardon Services. State v. McKay, 300 S.C. 113, 386 S.E.2d 623 (1991) (proper for the trial court to refuse to determine whether earlier violent offense conviction was part of one continuous course of conduct). Accord Williams v. Commonwealth, supra; Torrence, supra, 406 S.E.2d at 323 ("there is no way [for the court] to be assured

that the Parole Board would reach the same conclusion as the court [on questions of parole ineligibility]".)

Assuming he would, in fact, be ineligible for parole, that fact does not mean in South Carolina that he would never be "released" behind the prison walls. As noted earlier, life inmates are statutorily eligible for many correctional programs which allow for contact beyond the prison community.[13]Such programs as "work-release," unsupervised furloughs at the discretion of the Commissioner of Corrections, pursuant to S.C. Code Section

[13]On October 6, 1993, a compromise agreement to modify a federal court decree concerning conditions of confinement in the South Carolina prison system was filed in Harry Plyler et al. v. Parker Evatt et al., 82-876-2 (D.S.C.). The agreement, in part, would specifically allow inmates serving a sentence of life without parole to be eligible after ten years to a reduced custody classification that would enable them to be on state or publicly controlled property, such as public State House grounds. The propriety of the agreement remains in litigation.

24-3-210, suggest that life imprisonment in South Carolina may not mean being inside a prison for life. (J.A. 10-18). Further, it is recognized that life inmates are eligible, upon a proper showing for a pardon from the Parole Board. Also, during the term of their imprisonment, changes in law may occur which create parole eligibility where it did not exist previously.[14]

The critical point, however, is that South Carolina's determination that parole ineligibility is not a mitigating factor. The issue of parole eligibility or ineligibility is no more relevant under Lockett's test of character of the defendant, prior record, or circumstances of the crime than is the particular correctional facility or location that an inmate may be housed in if sentenced to

[14]See n. 3, Knox v. Collins, supra, 928 F.2d 660, n. 2.

life. The terms of the sentence of confinement do not reflect upon an inmate's dangerousness or nondangerousness.

The Petitioner would create a situation which would be inaccurate by suggesting parole ineligibility means an inmate will never be outside the prison in order to support his assertion that it is "mitigating." This inaccurate picture could lead to unreliable results which South Carolina has sought to avoid by its "plain meaning" instruction. Accepting his argument, a jury in a joint murder trial would find a benefit to a non-parole defendant due to a prior violent crime record over a parole eligible defendant who had no criminal record despite similar roles in the murder. The absurdity of this argument is that while both inmates may receive a life sentence, even the parole eligible defendant may <u>never</u> be

released on parole due to the circumstances of the crime since there is no presumptive parole. S.C. Code Section 24-21-640 (1989). Further, accepting his premise would also suggest that a jury would be more likely to sentence the parole-eligible inmate to death than the no-parole inmate with their similar roles. Similarly, what proper instruction would be made if the defendant offered never to seek parole if sentenced to life? The instructions given in this case, however, would properly focus the jury's attention solely to the characteristics and background of each defendant, their prior record, and his respective role in the crime.

Here, the jury instructions not to consider parole or parole eligibility and to consider life imprisonment and the death sentence in their ordinary and plain meaning provided the jury with proper

guidance to ensure that they would properly consider relevant mitigating evidence presented at the trial, including whether Simmons was adaptable to prison life. The instructions additionally followed the policy of a large number of states to assist defendants by forbidding a jury to increase its punishment by anticipation about forms of clemency.

Although Lockett and Eddings prevent a state from placing relevant mitigating evidence "beyond the effective reach of the sentencer .. those ... do not bar a state from guiding the sentencer's consideration of mitigating evidence." Johnson v. Texas, supra, 113 S.Ct. at 2666. "There is no constitutional requirement of unfettered sentencing discretion in the jury, and states are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable

administration of the death penalty." Boyde v. California, supra, 494 U.S. 370, 377.

The approach taken by South Carolina properly allowed for the more rational and equitable administration of the death penalty by the use of the challenged instructions in this case. The information provided to the jury was accurate information. As recently as 1990, it was reported that twenty-six jurisdictions, relying upon Ramos, had determined that the jury should not consider the possibility of parole, pardon, or commutation. State v. Hightower, 577 A.2d 99, 117 (N.J. 1990), citing People v. Ramos, 689 P.2d 430, 442 n. 10 (1984). Other state instructions that may provide specific information on parole, as South Carolina previously did, frequently are based purely on state law grounds. See Mackbee v. State, 575 So.2d

16, 38 n. 11 (Miss. 1990). The Petitioner's desire to revise South Carolina's practice purely because an alleged majority of other states may do it differently is the diversity among the state's that Ramos found permissible. Accord Spanziano v. Florida,supra. There is no constitutional requirement that "procedures involved in imposing the death sentence ... be structured to favor a defendant." Rook v. Rice, 783 F.2d 401, 406 (4th Cir. 1986). Here, neither the order of the instructions about parole and life imprisonment nor the language in the challenged instruction prevented the jury from making an individualized determination as to whether Simmons should be sentenced to life or death based upon his character, prior record, or the circumstances of his offense. The rule of Lockett has been applied.

Respondent would submit that this case may also bring to focus again why this Court's jurisprudence under Lockett has laid traps for unwary states, and is generating a fundamental uncertainty in the law that shows no signs of ending or even diminishing. See Walton v. Arizona, 497 U.S. 639, 656 (1990) (Scalia, J., concurring in part and concurring in judgment). Here, the South Carolina court sought to channel the sentencing jury's discretion toward the relevant mitigating evidence presented about Simmons character, prior record, and crimes. To reject this Court's earlier mandate under Ramos and conclude that the nature of parole ineligibility is a "mitigating" circumstance, despite the fact that has no relation to the character of the defendant or the circumstances of the crime would not lead to the "important additional safeguard against arbitrariness" and the

"reasoned moral response" in capital sentencing that the states have been encouraged to adopt. In conclusion, we encourage this Court not to take that step which is neither warranted nor necessary.

CONCLUSION

For all the foregoing reasons, the judgment of the South Carolina Supreme Court should be affirmed.

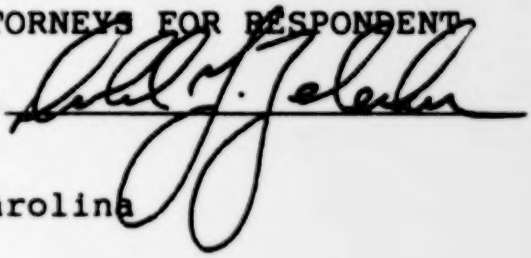
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